

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.**

In the Matter of)	
)	
Petition for Declaratory Ruling:)	CC Docket No. 01-92
Lawfulness of Incumbent Local Exchange)	DA 02-2436
Carrier Wireless Termination Tariffs)	

**CONCURRENCE WITH MONTANA LEC
MOTION TO DISMISS**

On October 18, 2002, the Montana Local Exchange Carriers (“Montana LECs”) moved that the Federal Communications Commission (“FCC”) dismiss the Petition for Declaratory Ruling (“the Petition”) filed by T-Mobile USA, Inc., Western Wireless Corporation, Nextel Communications, and Nextel Partners (“the CMRS Petitioners”). The Missouri Small Telephone Company Group (“MoSTCG”) concurs with the Montana LECs’ Motion. The FCC should dismiss the Petition because it seeks to invalidate a state commission order and preempt state law in violation of the FCC’s *ex parte* rules.

1. The CMRS Petitioners seek to invalidate the Missouri Public Service Commission (“MoPSC”) order in the *Mark Twain Wireless Tariff* case which approved wireless termination tariffs for a group of Missouri’s small incumbent local exchange companies (“ILECs”). The CMRS Petitioners repeatedly refer to the *Mark Twain* wireless tariffs, and the tariffs are specifically discussed on pages 5 and 6 of the Petition. The *Mark Twain* wireless tariffs were approved by the MoPSC after notice and hearing.¹ The tariffs were upheld by the Cole County

¹ *In the Matter of Mark Twain Rural Telephone Company*, MoPSC Case No. TT-2001-139, *Report and Order*, issued February 8, 2001.

Circuit Court,² and they are being reviewed by the Missouri Court of Appeals.³ Thus, the Petition seeks to preempt Missouri law.⁴

2. The CMRS Petitioners have not complied with the FCC's *ex parte* rules because they have failed to serve the MoPSC.⁵ Therefore, the Petition must be dismissed because it fails to comply with the notice and due process requirements of the FCC's Rules.

3. Additionally, the CMRS Petitioners have failed to serve the MoSTCG companies whose tariffs are at issue. Requests to invalidate tariffs should not be brought as declaratory ruling requests, but as formal complaints served upon each carrier whose tariff is targeted for invalidation.⁶ Thus, the Petition is procedurally improper and must be dismissed.

Conclusion

The MoSTCG concurs with the Montana LECs' *Motion to Dismiss* and respectfully requests that the Commission dismiss the Petition for Declaratory Ruling filed by the CMRS Petitioners.

² *State ex rel. Sprint Spectrum L.P. v. Missouri Public Service Comm'n*, Case No. 01CV323740 (decision issued Nov. 26, 2001).

³ *Sprint Spectrum L.P. v. Missouri Public Service Comm'n*, Missouri Court of Appeals Case No. WD 60928 (briefed, argued, and awaiting decision).

⁴ *See Bauer v. Southwestern Bell Tel. Co.*, 958 S.W.2d 568, 570 (Mo. App. 1997)(A tariff approved by the MoPSC has "the same force and effect of a statute approved by the legislature.").

⁵ 47 C.F.R. § 1.1206, note 1; *In the Matter of Amendment of 47 C.F.R. § 1.1206 et seq. Concerning Ex Parte Presentations in Commission Proceedings*, Memorandum Opinion and Order, 14 FCC Rcd 18831, 18838 (released November 9, 1999).

⁶ *In the Matter of Communique Telecommunications, Inc. d/b/a Logically*, 14 FCC Rcd 13635, 13649 (released August 9, 1999).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was sent by U.S. Mail, postage prepaid, on this 1st day of November, 2002 to the following:

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